TAN SHIANG SHONG

v.

TAN LEE CHOON & ORS.

HIGH COURT MALAYA, RAUB
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 55 OF 1978]
19 OCTOBER 1983

CONTRACT: *Specific performance - Agreement for sale of land - Whether valid.*

LIMITATION: *Whether plaintiff's claim statute barred - Defence of laches - Limitation Act 1953, s. 9(1).*

The plaintiff sought to enforce specific performance of an agreement dated 31 January 1951 for the transfer of two pieces of land and the payment of RM7,000 in consideration that the plaintiff renounces all his rights and claims against the 1st defendant and the deceased. The agreement was a result of a civil suit instituted by the plaintiff against the defendants. The agreement was subsequently partly fulfilled by the payment of RM7,000. In 1957 there were negotiations to transfer the lands but the defendants failed to turn up at the solicitor's office. In 1977 following the demise of one of the parties to the agreement further negotiations took place for the transfer and again the 1st defendant failed to turn up. The plaintiff then instituted the action in 1978. The defence raised the Limitation Act and the doctrine of laches.

Held:

[1] Since the plaintiff is seeking to recover two pieces of land by specific performance of the agreement, the case falls under s. 9(1) of the Limitation Act 1953 and the period of limitation is 12 years.

[2] On the facts of the case the cause of action accrued in 1957. Hence this action 21 years later is statute barred.

[3] In any case the defence of laches should only be considered and allowed where there is no statutory bar.

[Plainriff's claim dismissed.]

Cases referred to:
Nasri v. Mesah [1971] 1 MLJ 32
Ng Moh v. Tan Bok Kim & Anor. [1969] 1 MLJ 46
Bolo v. Koklan & Ors. LR 57 1 A 325 [1930] AIR PC 270

Legislation referred to:
Limitation Act 1953, s. 9(1)

For the plaintiff - Joseph Loo; M/s. Sri Ram Zulkifly & Kumar
For the 1st defendant - S. Sivasubramanian; M/s. S. Sivasubramanian
For the 2nd defendant - Morris Edgar; M/s. Morris Edgar Clough Thuraisingham

JUDGMENT

Shaik Daud Ismail J:

This is an action by the plaintiff in which he claimed specific performance of an agreement dated 31 January 1951, an inquiry into the accounts and damages.

The facts of the case as set out in the plaintiff's statement of claim are as follows:

By an agreement in writing dated 31 January, 1951 (P2) made between the plaintiff of the one part and the first defendant and Tan Boon Pin @ Tan Poon Pin (deceased) of the other part whereby the first defendant and Tan Boon Pin @ Tan Poon Pin agreed *inter alia* to convey and transfer to the plaintiff all those two pieces of land situate at, and held under EMR 501 and 516 for Lots 588 and 589 respectively, Mukim Pedah, in the District of Kuala Lipis, Pahang, and to pay to the plaintiff the sum of RM7,000, in consideration that the plaintiff renounces all his rights and claims against the first defendant and the said Tan Boon Pin @ Tan Poon Pin. It was also a term of the said agreement that the first defendant and Tan Boon Pin @ Tan Poon Pin shall convey and transfer to the plaintiff the said two pieces of land when they became the registered owner thereof. The said agreement has been partly performed in that the first defendant and the said Tan Boon Pin @ Tan Poon Pin have paid, and the plaintiff has received the said RM7,000. The plaintiff claimed that the first defendant and the said Tan Boon Pin @ Tan Poon Pin have refused and/or failed to so convey and transfer the said lands or at all.

In their statement of defence, apart from pleading that there was no valid agreement both the defendants raised the defence of limitation.

The plaintiff in his evidence stated that this is the first time his claim came up for hearing and the prior to this he did institute a similar action against the same defendants vide Raub High Court Civil Suit No. 7 of 1950. According to the plaintiff that suit did not go on for trial because the defendant requested a settlement and the matter was then settled and the plaintiff withdrew the suit. According to the plaintiff it was as a result of that settlement that the agreement dated 31 January 1951 was signed between himself and the two defendants. The plaintiff explained that the agreement to transfer the 2 pieces of land and the payment of RM7,000 to him was a property settlement, as both the first defendant and the said Tan Boon Pin @ Tan Poon Pin are his cousin brothers. The plaintiff testified that the RM,7,000 was paid to him after the agreement P2 had been signed, RM3500 was paid first and the balance at RM500 per month for 7 months. The 7 payments were paid by cheques. The plaintiff said that he only received the first instalment of RM500 and thereafter all the other cheques bounced. As a result of this plaintiff instituted another civil suit i.e. Raub High Court Civil Suit No. 263 of 1951 for the recovery of the RM3,000. The plaintiff stated that when this writ was served the defendants paid up the RM3,000. After that in 1957 plaintiff said he received a letter from the solicitors of the defendants dated 8 January 1957 requesting him to be present at the solicitors' office to complete the transfer of the two pieces of land in question. The plaintiff accordingly went to the solicitors' office when he was told to come back in a few day's time. Accordingly, the plaintiff went again to the solicitors' office a few days later but was told that nothing could be done as both the defendants failed to turn up. In 1977 Tan-Boon Pin @ Tan Poon Pin passed away and plaintiff alleged that first defendant asked him to go to the office of another solicitor in Temerloh to effect the transfer. As requested the plaintiff went to the solicitor's office in Temerloh but the first defendant failed to turn up. The plaintiff said that he made several oral requests to the defendants to transfer the two pieces of lands but they refused and he had no alternative but to file this present suit. As he is at all times ready and willing to perform his part of the agreement he now prays for specific performance.

At the close of the case for the plaintiff both Counsels for the defendants adopted not to call any evidence and made submissions of no case to answer. Both Counsels contend that as the claim is based on an agreement dated 31 January 1951 by virtue of s. 9(1) of Limitation Act 1953, the plaintiff's action is statute-barred. Now s. 9(1) states:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

Counsel for the second defendant also raised the question of laches.

In this action what the plaintiff is asking for is an order that the defendants do execute a valid and registrable transfer of the two pieces of land. As such, this action essentially is an action to recover land. As was held in *Nasri v. Mesah* [1971] 1 MLJ 32:

> It follows therefore, that whether the action is for specific performance of an agreement for sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

In this case since the plaintiff is seeking to recover the two pieces of land by specific performance of the Agreement I hold that his case falls squarely under s. 9(1) of the Limitation Act 1953, and the period of limitation is 12 years.

The next question to be determined is when such period of limitation begins to run. It is the contention of the Counsel on behalf of the plaintiff that since the agreement P2 did not provide for a completion date the right of action still accrues. He also contends that when the suit was filed the parties to the agreement were still alive and the agreement was capable of being performed. Tan Boon Pin @ Tan Poon Pin died in 1977 and according him time should accrue from the date of death of one of the parties to the agreement i.e. 1977.

I am of the view that this is not the right approach to the issue. The decision of the Federal Court in *Ng Moh v. Tan Bok Kim & Anor.* [1969] 1 MLJ 46 was that time did not begin to run until there was an infringement of the plaintiff's right under the agreement. In coming to that decision in *Ng Moh's* case the Court relied on the Privy Council's decision in *Bolo v. Koklan & Ors.* LR 571 A 325 [1930] AIR PC 270, in which it was said at page 331:

> There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.

In the present case there are clear evidences of the defendants' unequivocal threat to infringe. According to the plaintiff between 1951 and 1957 he made several requests to the defendants to transfer the two pieces of land but to no avail. Then by a letter dated 8 January 1957 from a firm of solicitors P4 requested the plaintiff to be present at the office of the solicitor to effect the transfer. When the plaintiff presented himself the defendants failed to turn up. The plaintiff also said whenever he met the defendants he requested the transfer but they failed to do so. It must be obvious to the plaintiff then from inactions of the defendants that they refused to effect the transfer. The defendants thus clearly and unequivocally threatened to infringe the agreement and the plaintiff should have brought the action against them but he failed to do so. Further the plaintiff admitted that in 1951 he instituted an action against both defendants when their cheques for the payment of the balance of RM7,000 bounced and successfully recovered the sum of RM3,000 but he did not raise the question of the transfer of the land in question.

The plaintiff's explanation for not instituting Court action against the defendants to transfer the lands was that firstly he trusted them and secondly that as the defendants are his elder cousins according to Chinese custom he being the younger had to wait when they told him to do so. I find this explanation hard to accept because that being so it did not stop him from instituting the suit against them to recover the RM3,000 in 1951.

In the context of this case I am of the view that the cause of action accrued in 1957 when the defendants had shown clear and unequivocal threat of infringement of the plaintiff's right under the agreement when they ignored his numerous requests to transfer the two lands. The defendants through their solicitors sent a letter to the plaintiff asking him to be present before the solicitor to effect the transfer but they, the defendants, never showed up. The plaintiff did not avail himself of his right to sue them but waited some 21 years later to do so.

In the event I hold that plaintiff's claim is statute barred.

On the question of laches the plaintiff himself has shown that he has unduly delayed bringing this action. He had from 1951 up to 1966 to bring this action to enforce the agreement but he failed to do so and his explanation for not doing so, as I mentioned above, is most unreasonable and cannot be accepted. In any case the defence of laches should only be considered and allowed where there is no statutory bar. As I mentioned earlier the plaintiff's action is statute barred by virtue of having been filed more than 12 years after the cause of action accrued.

For the above reasons I dismissed the plaintiff's claim.

Also found at [1984] 1 CLJ 126